

# Slovenia: Second Wave of Challenges to Constitutionalism

---

Samo Bardutzky

2021-03-19T09:00:33

## A Year in Review

Slovenia had a very different experience in the first and the second wave of the 2020 COVID-19 pandemic. In the first wave, the number of infections and deaths *per capita* has been comparatively low and Slovenia was even identified as a [“corona success story”](#). The second wave, however, has propelled Slovenia into the highest ranks of mortality *per capita* globally with the total of [162 deaths per 100,000 people](#) from the beginning of the pandemic until 25 January 2021. The Government introduced stringent measures in Autumn 2020, including the complete ban on assembly and sale of non-essential items, the closure of educational institutions, a strict 9 pm – 6 am curfew, and the prohibition of movement across municipal borders. Most of these measures were only lifted in February/March 2021. Despite the long duration of the measures, the virus spread exponentially in the Autumn months of 2020. On the other hand, Slovenian media questioned the absence of potential measures that might have saved lives, but were not imposed or encouraged in the final months of 2020: [increased protection measures in senior citizen’s homes](#) and [prevention of spreading in workplaces](#). With regard to the former, given that the residents and staff of the senior citizen’s homes were the most affected by the disease in the first wave in Spring 2020, it was difficult to believe that in the second wave, we have again observed a fast spreading of the virus in these institutions. With regard to the latter, there are reasons to believe e.g. that with well-designed government subsidies and incentives, more companies could have organised work from home as well as made sure that infected employees did not appear at their workplaces for fear of losing income.

The Slovenian [Constitution](#) contains a framework for the declaration of a state of emergency (*izredno stanje*, Art. 92) and temporary suspension of human rights and fundamental freedoms during a state of emergency (Art. 16). However, this framework was not deployed during the COVID-19 epidemic. Instead, all restrictive measures that aimed at preventing the spreading of the virus were enacted on the basis of the [Communicable Diseases Act](#) (ZNB), a pre-epidemic piece of legislation. ZNB has seen some changes in 2020; but these were minor and did not expand the legal basis for the enactment of restrictive measures. Instead, the existing provisions of ZNB were stretched to the very extremes and beyond an acceptable legal interpretation to cover some of the anti-COVID government ordinances. Hence, the assessment that we made in April 2020, that this was [“business as usual, but to the unusual extremes”](#), has remained and increased its relevance during the second wave.

# The Executive and Use of Powers in Response to Emergency

Without any doubt, the tackling of the epidemic has been by and large in the hands of the executive branch, more specifically, the Government (i. e. the cabinet of ministers, Slov.: *vlada*). All of the measures that encroached most intensively upon the human rights and fundamental freedoms as guaranteed by the Constitution were enacted in the form of government ordinances (Slov.: *odlok*). There are recurring issues with the legal bases for the ordinances, as mentioned above. The Constitutional Court has so far avoided the issue of formal legality of the ordinances despite doubts expressed by dissenting judges ([e.g. Judge Mežnar in U-I-83/20](#)).

Additionally, as the measures change quite rapidly, there is little or no time and space for the judiciary to develop a consistent interpretation of the legal norms in the ordinances. Instead, the general public looks to the representatives of the executive branch to “explain”, in press conferences or statements otherwise made to the press, how to properly observe the measures. It is our impression that at least in general, there has been genuine interest among the majority of the population to comply with the measures – not only so as to avoid a fine but also as behaviour that will protect them from a potentially deadly infection.

In that, the executive takes on the task of providing the interpretation of the law that it itself made, upsetting the traditional balance of powers in the constitutional system. In addition, such informal interpretative statements by the ministers do not bind the officers in charge of enforcement. For example, the police fined [a food delivery man 400 euro for eating burek](#), a popular snack, in Prešeren Square in the heart of Ljubljana, claiming he violated the rule to wear a face mask outside. This caused notable uproar in the public that generally sympathises with food delivery staff, as they help everyone else stay home while exposing themselves to risks in a precarious work situation. The [ministry of economy publicly stated](#) that the ordinance in question was not intended as a general ban on consumption of food and beverages outdoors but rather as a measure preventing people from gathering near the takeaway restaurants to enjoy their meals. The inspectors, however, interpreted the language of the ordinance differently and issued fines. And, of course, following the constitutional principles that guarantee independent and professional civil service (Art. 120 Constitution and Art. 4 [Inspection Act](#)), they were entitled to do so. The responsibility lies with the government in drafting clear, coherent and easily understandable laws – even more so when judicial oversight is limited.

## The Effectiveness of Judicial Scrutiny

The Constitutional Court has been seized with challenges to the restrictive measures a number of times during the second half of 2020. It can be observed that it has so far predominantly limited itself to reviewing formal requirements of legality and constitutionality rather than exercising its full powers of substantive review of constitutionality. The Court has thus emphasised, first, the need for the restrictive

measures to be periodically reviewed (preferably on a weekly basis, see [U-I-83/20](#) – summary in English) and second, the requirement for the measures to be correctly published in the Official Gazette (Art. 154 Constitution, see [U-I-445/20](#)). When reviewing the prohibition of movement across municipal borders that was in force in Spring 2020, the Court did apply the proportionality test. However, it significantly watered down this test compared to the manner in which it usually exercises it. As far as the test of necessity (one of the prongs of the strict proportionality test) goes, the Court barely touched it; its argumentation did not at all mention that there were less strict alternatives available, even if they were even discussed publicly, such as the prohibition of movement across the borders of territorially significantly larger administrative units.

Despite this reserved approach of the Constitutional Court, it has not been spared criticism from the representatives of the executive branch. When the Court declared that the government orders prolonging the closure of the schools were legally inexistent as they were not published in the Official Gazette as required by the Constitution, the [comment of the official “COVID-19 spokesperson” was that this decision was “unexpected”](#). The [Prime Minister that day tweeted](#) (in Slovenian, omitting any express mention of the Court): *“The first question every morning is who will queue up to make it difficult to control the #epidemic #coronavirus. Manifestly, the source of mischief-makers is endless. Regardless of the consequences.”*

Despite declaring all COVID-19 measures related cases as enjoying absolute priority in the Court’s workload, commonly decisions of the Court are issued long after the measures have been changed or invalidated by the government itself (in U-I-83/20, the challenge against prohibition of movement was launched against an ordinance that entered into force on 30 March; an *ad interim* order was issued by the Court on 16 April; there was already a new ordinance on movement as of the end of April 2020; the final decision of the Court on merits was issued on 27 August 2020). This can, at least in part, be ascribed to the workload managing problems that the Court has experienced for two decades now.

In some cases, the Constitutional Court has ordered *ad interim* measures. Most striking, perhaps, was the [order to reopen the schools where children with special needs are educated](#). The Court, on the other hand, rejected the motion for *ad interim* relief where the curfew (see Section on Human Rights Considerations) was challenged, restricting its argumentation for the rejection to simply mentioning the applicable article of the Constitutional Court Act, with no discussion of the facts.

## Legislative Oversight

As all of the restrictive measures (curfew, closure of schools, etc.) are adopted in the form of government ordinances, there is no direct mechanism of legislative scrutiny of these ordinances. Of course, the National Assembly (*Državni zbor*) could always override them with a statute. But it has not even decided to overhaul the insufficient legal bases in the ZNB. A number of other instruments of parliamentary control of the executive remain at disposal of the National Assembly (e.g. parliamentary

questions or parliamentary inquiry), however they have not been used to scrutinize the ordinances systematically or meaningfully.

The National Assembly has, however, exercised legislative scrutiny when it comes to the so-called “anti-Corona packages” (Slov. *protikoronski paket* or PKP). These are statutes proposed by the Government to the National Assembly and they typically contain measures such as subsidies to companies and individuals affected by the closures. They typically contain amendments to a number of laws, in particular social security legislation. This mosaic character of the PKPs has been seen by the Government and the coalition parties as an opportunity to include provisions that have little to do with the prevention of negative economic consequences but can rather be ascribed to more long-term, structural changes in the Slovenian economy and society. [An example of such a provision that was thrown out in the legislative procedure was a permanent mechanism of subsidising social contribution for priests and clergymen](#). On the other hand, in U-I-16/21, the Constitutional Court was currently seized with a [challenge](#) and issued *interim* relief against a provision of the 7th PKP that survived legislative scrutiny and made it possible for the employer to fire an employee for the sole reason that he or she is entitled to retire within the Slovenian obligatory pension system. This, in addition to being problematic from the aspect of [ILO’s Termination of Employment Convention](#) and the guarantee of equality in the Slovenian Constitution (Art. 14), also has little to do with solving the difficult situations of many Slovenians who have lost their income during the epidemic; it is rather an attempt to introduce a neoliberal agenda under the guise of tackling the virus.

The sneaking of systemic solutions into “anti-Corona packages” involves a significant constitutional issue. [Legislative referendums have in the past proven to be a frequently used control of the electorate over the National Assembly](#), sometimes also with suspect motives. The 2013 reform of the Constitution prohibited legislative referendums on statutes “on urgent measures to ensure the defence of the state, security, or the elimination of the consequences of natural disasters.” It is the practice of the National Assembly to adopt an [order](#) to declare that the entire PKP falls under this prohibition of referendums, thus curtailing the power of the electorate to scrutinise, by exercising direct democracy, the systemic solutions bundled up with the temporary relief measures.

## Human Rights and Civil Liberties Considerations

A more exhaustive discussion of the restrictive measures from the point of view of limiting human rights and fundamental freedoms under the Slovenian Constitution is available [here](#). The second wave has, to a large extent, seen a return of the measures known from the first wave, such as the prohibition of movement across municipal borders and the total ban on assembly. The latter raises renewed concerns regarding the right to peacefully express discontent with the government policies. Such protests in Slovenia, by and large, have not been directed against mask-wearing and limitations on movement as they have in many other European countries, [but rather against corruption in procurement of personal protective equipment and what is perceived as the government taking advantage of the](#)

[pandemic to further its economic and political agenda](#). The Government has avoided declaring a total movement ban (with some exceptions) as it has done in the first wave ([described in our previous post](#)). Instead, a strict 9 pm – 6 am curfew (*policijska ura*) has been in force in Slovenia since 20 October. This means that there is a total movement ban in that period of time with three exceptions (work commute and urgent work-related activity, urgent services, removal of direct danger to life, health or material wealth); two were added shortly after (delivery of food and medications and transit travel through Slovenia). There are no exceptions either for the purpose of recreation, as is often the case in other countries or for maintaining contact with close family members (e.g. children of divorced parents), as was also pointed out by Constitutional Court Judge Mežnar [in a separate opinion](#).

The 9 pm – 6 am strict curfew is a relevant case study of limitations of human rights in the epidemic for another pertinent reason. It has been revealed that the expertise [that would support the introduction of the curfew](#) was scarce, almost non-existent. This makes the exercise of the first prong of the strict test of proportionality, the test of appropriateness/“proper fit” impossible. Or rather, we should insist on the burden of the norm-maker to show that epidemiological expertise has been taken into account when deciding on the measures, including the list of exceptions and the duration of the measure. (Support for this position can be found in [Aharon Barak’s 2012 book \*Proportionality\*](#)). However, there are serious concerns with regard to the source of expert arguments and the weight of the voice of the government’s specially created panel of experts. [The panel chairperson at some point even publicly stated that in her view, the expert panel has ceased to function](#). This puts in question the respect for the central and most vital element of the Slovenian constitutional rules regarding the limitation of human rights and fundamental freedoms (Art. 15 and Art. 2): the principle of proportionality.

## **Rule of Law/*Rechtsstaat*/pravna država** **Considerations**

Comparatively speaking, Slovenia is a country where constitutional guarantees stemming from the principle of a “state governed by the rule of law” (*pravna država*, Art. 2), the Slovenian version of the *Rechtsstaat* principle, are important constitutional values and strong independent headings of judicial review. As was mentioned above (see the section on the executive power), this indirectly links also to the balance of governmental powers.

There are a number of issues with the COVID-19 restrictive measures that would warrant attention from this point of view. The constitutional rules not only on proportionality, but also on obligatory publication of laws, on predictability, and on clarity and coherence of the norms have been frequently invoked in the past year. This needs to be mentioned but a thorough analysis would exceed the format and limits of this short text. Especially because such an analysis would also need to take into account the attitude of the representatives of the executive and legislative branches towards the rule of law. The epidemic has taught us that these politicians often possess shockingly poor understanding of these constitutional

rules, exemplified by [the disbelief of the minister of interior that posting regulations on the Government website cannot substitute publication in the Official Gazette](#), as required by Article 154 Constitution. Given the importance of *Rechtsstaat*/*pravna država* guarantees in European continental, and especially post-totalitarian/post-authoritarian constitutional systems, this would in our opinion represent a fascinating research agenda for future comparative research by students of states of emergency.

## 2021 Outlook

Below is a selection of rather modest proposals that would strengthen the respect for the values of constitutional democracy. Only to take these seriously would assuage many of the concerns of (constitutional) lawyers in a country such as Slovenia.

- Attention needs to be paid to **legal certainty, predictability and clarity of the law** that enacts restrictive measures. While the development of the disease is difficult to prognose, the government should strive to its best ability to avoid quick changes and should do its best to give the population as much time as possible to prepare for the restrictions entering into force in the future. This helps people, businesses and organisations such as schools to plan and, very importantly, keep mentally stable.
- The structures through which **medical/epidemiological expert advice** enters the government decision-making processes should be transparent and organised in a way that allows the public to familiarise itself with the advice and with the government's reaction to this response. Both expert advice as well as political arguments should be clearly on display for the public to be able to hold an informed debate and hold political decision-makers accountable.
- **Legal bases in primary legislation** that are relied upon to adopt executive measures should be exposed to strict scrutiny, public and parliamentary.
- The government should, in sincere good will, **heed the Constitutional Court' positions** in the COVID-19 cases and take them extremely seriously in drafting new ordinances.

